IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.48 OF 1997

Shri Murlidhar Sazu Sinai
Salelkar, married, landlord,
Residing at Sanguem. ..... Appellants.

V/s.

Shri Purxottam Govind Porob Desai,
Smt. Sarojini Purxottam Porob Desai,
(deleted as per order in MCA.454/99
dated 22.6.2000)

Shri Udaibanu Purxottam Porob Desai,
Originally residing at Neturlim
and at present residing at H.No.707,
Aquem,Vidyanagar, Salcete, Goa. ..... Respondents.

Shri M.B. D'Costa, Sr. Advocate with Mr. J.A. Lobo,
Advocate for the appellant.

Shri A.P. Lawande, Advocate for respondent No.3.

CORAM : N.N. MHATRE, J.

DATE OF RESERVING THE JUDGMENT :
30TH JANUARY, 2004.

DATE OF PRONOUNCING THE JUDGMENT :
26TH FEBRUARY, 2004.

J U D G M E N T :

The suit was filed by the respondent as well as two other persons claiming to be the owners in possession of the property known as "Bombdo" situated at Neturlim (for the sake of convenience, the respondent herein who was the plaintiff No.3 in the suit, is

referred to as "the plaintiff" and the appellant herein who was the defendant in the suit, is referred to as "the defendant"). The property was described by the plaintiff as bounded towards the east by "Volado Bibel", to the west by "conduto das aguas" and the lands of the Communidade of Neturlim; towards the south by a river and towards the north it was bounded by land of the Communidade. According to the plaintiff, the property was described in the Land Registration Office under No.20510 and was enrolled in Revenue Office under Nos. 479 and 480. The plaintiff claims that he along with the other two plaintiff enjoy actual possession, and occupation of the land which included a paddy field and a coconut grove. The plaintiff claims to have purchased the land on 11.8.1959 from the previous title-holder Raya Bottu Sinai Lad. The plaintiff No.1 and his wife gifted the property to the other plaintiff no.3 in the suit who is their son. The names of plaintiff No.1 and 2 shown as respondents No.1 and 2 to the second appeal, have been deleted by order of 22.6.2000. The suit filed by the plaintiff along with other two, was for a permanent injunction against the defendant restraining from interfering in any manner with the plaintiff's possession. The suit filed by the plaintiff was for the following reliefs :

(a) For a decree in the nature of permanent injunction against the defendant so that the defendant and/or his agents, servants, relatives, etc., be permanently restrained from interfering in any manner with the plaintiffs' area of the property shown in the sketch within the red line;

(b) for ex-parte ad-interim temporary injunction in terms of prayer (a) above;

(c) For costs.

2. The defendant in the written statement submitted that the plaintiff did not have the right to the property claimed in the suit, more particularly described in para 1 of the plaint. According to the defendants, he purchased the property known as "Corquem Poiquim Ticana" also known as "Predio rustico Mixto Corqueampoiquim Tican" along with one Bhanudas Gopinath Naik Karmali from Antonio Francisco Braganca and his wife. This property was registered under Land Registration No.23219 and in the Land Revenue Office under No.475. The boundaries of this property were described in the Written Statement. The defendant contended that the property was not adjoining the property that belonged to the plaintiff as the land owned by the Communidade of Neturlim lies between the two properties. The defendant, thus, disputed the plaintiff's claim.

3. Evidence was led before the trial Court of

the plaintiff No.1 in suit as also certain other witnesses, including the Civil Engineer who claimed to have assisted one Jivotomo Contoco who drew a sketch describing the property. Interestingly, this Jivotomo Contoco was not examined before the trial Court despite the fact that he was still alive when the evidence was being recorded. The trial Court decreed the suit. Being aggrieved by the Decree, the appellant herein field a Regular Civil Appeal No.30/1988/A. The appellate Court dismissed the appeal. Both the Courts below were of the view that the plaintiff had proved his case that the disputed land belonged to him and, therefore, the appellant herein was restrained from interfering with the suit land. Being aggrieved by the Orders of the trial Court as well as the appellate Court, the appellant herein has preferred the present second appeal.

4. Mr. D'Costa, learned Counsel appearing for the appellant submits that the reliefs sought in the plaint was that a permanent injunction should be granted to the plaintiff, restraining the defendant from interfering with the plaintiffs' property shown in the sketch within the red line. This sketch was not a map drawn according to scale, nor was it founded on any revenue records or land records. The learned Counsel

submits that this sketch was a mere free hand drawing Learned Counsel further submits that assuming the sketch is correct, the boundaries in the plaint do not tally nor do the witnesses for the plaintiff mention the boundaries as depicted in the plaint or in the sketch. The learned Counsel then submitted that the sketch was not proved as the author Jivotomo Contoco had not been examined. Therefore, according to the learned Counsel, a decree based on a sketch which was not proved, was illegal and was required to be set aside. Learned Counsel then submits that both, the trial Court and the appellate Court had fallen in error by decreeing the suit by picking holes in the defence of the appellant rather than on the basis of the plaintiff having proved his case. He submits that a party who institutes a suit is required to prove his case and not base his foundation on the lacunae in the defence. Learned Counsel relies on the Judgment in the case of Punjab Urban Planning & Development Authority vs. Shiv Saraswati Iron & Steel Re-Rolling Mills, (1998) 4 SCC 539; Rohini Prasad and ors. vs. Kasturchand and anr., (2000) 3 SCC 668, Hafazat Hussain vs. Abdul Majeed, (2001) 7 SCC 189, Makhan Lal Bangal vs. Manas Bhunia and ors., (2001) 2 SCC 652, Klwant Kaur and ors. vs. Gurdial Singh Mann (dead) by Lrs. and anr., (2001) 4 SCC 262.

5. Per contra, Mr. Lawande learned Counsel for the respondent submits that both the Courts below had given a finding of fact that the respondent was in possession of the suit property, although the parties were aware of the disputed land and had in fact identified the same. Therefore, according to the learned Counsel, the grievance made by the appellant that the suit property had not been clearly identified is just a bogey being raised at this stage. Learned Counsel submits that an injunction can be granted even when the plaintiff is in possession without a title. He submits that there is no embargo on granting such an injunction, specially since there was a finding of fact that the plaintiff was in possession of the land. He submits that a barbed wire fencing had been erected in 1974 itself around the property and, therefore, the property had indeed been identified.

6. As stated earlier, the plaint describes the property known as "Bombdo" which is registered in the Land Registration Office under No.20510 and enrolled in the Revenue Office under Nos. 479 and 480 as being bounded on the east by "Volado Bibel", on the west by a water drain and the lands of the Communidade of Neturlim; towards the south by a river and towards the north by land of the Communidade. According to the

plaintiff, this land was also known as "Predio Rustico Bondia Natiavoril Nocodbabo" In the evidence of PW.1, who was the plaintiff No.1 in the suit, he deposed the property of the defendant as "Corquempoiquim Tican" which lies to the east of his property "Bombdo". Later in the evidence, in cross examination, he states as per the documents the property "Bombdo" bounded on the eastern side by property known as "Velado Bibel". He has admitted that this "Velado Bibel" is not shown to the east of his property in the sketch. He has also admitted in the cross examination that the sketch was drawn by Jivotoma Contoco in 1974 based on the boundaries shown by plaintiff No.3. He has also admitted that no sketch was appended to the sale deed when he purchased the property "Bombdo". The other witnesses have also not been able to aid the plaintiff's case. PW.3 one Rosario Antao who claims to have been working for the plaintiff, has described the property as lying adjacent to the property of the defendant. One Sakharam Bhindo who was examined by the plaintiffs deposes to the fact that he had accompanied Jivotomo Contoco and assisted him in drawing the sketch. He has stated that although Contoco was alive, he had not been examined. This witness has also admitted that the sketch had not been drawn to scale and that the boundaries were not shown as per the documents, but on

inquiries made with local people.

7. There is no doubt that both the Courts below have relied on a document which has not been proved. This document which is the sketch of the land is not a plan obtained from the Survey Records. The author of the sketch has not been examined before the Court. The boundaries depicted in the sketch are not the same as contained in the plaint. Nor are the same as stated in the deposition by the witnesses examined on behalf of the plaintiff. Both the Courts below are clearly in error to have relied on the sketch when it has not been proved. There is no reasoning either in the Judgment of the trial Court or the appellate Court as to how the sketch could be considered as proved. The decree sought by the plaintiff was on the basis of the sketch which, according to the plaintiff, identified the disputed property. The appellate Court has also fallen in error by accepting the sketch as proved. Although it was submitted before the appellate Court there ought to have been a concrete finding on issue No.4 as to whether the plaintiff had proved that the sketch attached to the plaint depicts the real position of their property "Bombdo". The appellate Court was also of the view that this disputed portion was part of the property "Bomdo" and no illegality has been committed by the trial Court

by discussing various issues together.

8. On a perusal of the sketch, from the records before the trial Court, it is seen that the boundaries depicted in the sketch are not as described either in the plaint or those described by the plaintiff in his deposition or by his witnesses. Reliance placed by the trial Court and the appellate Court on such a sketch without it having been proved is contrary to law. In fact, as a result of acceptance of this sketch, both the Trial Court as also the appellate Court have arrived at perverse findings which are required to be set aside. As held in the case of Hafazat Hussain vs. Abdul Majeed (supra) if the trial Court or the appellate Court arrive at the findings which are not only vitiated due to perversity of reasoning but also due to surmises and misreading of the materials on record, this Court can exercise its jurisdiction under Section 100 of the C.P.C. In the case of Kilwant Kaur and ors. vs. Gurdial Singh Mann (dead) by Lrs. (supra), the Apex Court in paras (33) and (34), held as under :

> "33. Referring to the above conspectus of the matter, Mr. Mehta contended that the High Court could not, in the absence of a substantial question of law interfere with the findings of the lower appellate court which has otherwise the authority and jurisdiction to scrutinise and appraise the evidence. Mr. Mehta contended that suspicious features of the will are mere questions of fact which can be gone into up

to the stage of the first appellate court only and not beyond and the High Court in the absence of a substantial question of law framed by the parties or if not so framed by the Court itself, had no jurisdiction to entertain the appeal far less allowing it and it is an interference which is totally unauthorised or in excess of jurisdiction or having no jurisdiction whatsoever. We are however not in a position to lend concurrence to such a broad proposition as enunciated by Mr. Mehta. Judicial approach being justice-oriented, exclusion of jurisdiction of the High Court under the circumstances as contended by Mr. Mehta, would lead to an incongruous situation being opposed to the concept of justice. Technically alone by itself ought not to permit the High Court to decide the issue since justice-oriented approach is the call of the day presently. The learned Single Judge in the matter under consideration has delved into the issue as to whether in fact the evidence on record warrants such a conclusion - whether the High Court was right in such appreciation or not - that is entirely a different issue. But the fact remains that scrutiny of evidence will be totally prohibited in the matter of exercise of jurisdiction in second appeal would be too broad a proposition and too rigid an interpretation of law not worthy of acceptance. If the concept of justice so warrants, we do not see any reason why such an exercise would be deprecated. This is however without expression of any opinion pertaining to Section 100 of the Civil Procedure Code.

35. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on

> the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-a-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication - what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below :
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> > "103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal.-
> >
> > (a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or
> >
> > (b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."
>
> The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

9. It is obvious that the findings arrived at by the trial Court and the appellate Court to the effect that the property is identified and that the disputed portion of the property is in possession of the plaintiffs, is based on conjunctures and surmises and

not on the basis of evidence on record. In fact, the findings recorded are perverse and not borne out by the documentary and oral evidence on record. Once it is held that the trial Court and the Appellate Court had committed an illegality by relying on the sketch which was not proved, all the inferences drawn by both the Courts below, on the basis of this sketch must be set aside.

10. Mr. D'Costa, for the appellant has submitted that both the Courts below have fallen in error in decreeing the suit on the basis of loopholes and lacunae in the case of the defendant. He submits that the plaintiff has to succeed or fail in his suit on the basis of the averments made in the plaint and the evidence broughtforth by him before the trial Court. As observed in the case of Punjab Urban Planning & Development Authority vs. Shiv Sareaswati Iron & Steel Re-Rolling Mills, (1998) 4 SCC 539, a party must succeed or fail on his own case and cannot take advantage of weakness in the defendant/respondent's case to get a decree. There is no manner of doubt that the disputed property has not been identified correctly by the plaintiffs and therefore, granting of an injunction against the appellant was improper. Both the trial Court and the appellate Court have misread the evidence

which has led to miscarriage of justice. As held in the case of Rohini Prasad and ors. vs. Kasturchand and another (supra), the High Court in a second appeal can interfere if the findings are perverse and based on no evidence or on a misreading of evidence which has resulted in miscarriage of justice.

11. The Courts below have not addressed themselves to the issues framed and have thereby caused grave injustice to the appellant/plaintiff. The plaintiff was required to prove certain issues including that the disputed property, as described in the plaint, was part of the property known as "Bombdo". The plaintiff was also required to prove that he was in continuous, peaceful possession of the property and that the defendant had encroached on the land on 28.6.1974. The trial Court and the appellate Court instead of addressing themselves to these issues and ascertaining whether the plaintiff has proved his case, have come to the conclusion that the defendant was not able to prove his defence. The defendant had not disputed the fact that the land known as "Bombdo" belonged to the plaintiff. What was disputed by the defendant was that the disputed property did not fall within the property known as "Bombdo" which was registered in the Land Registration Office under No.20510. According to the

defendant this property was part of his own property. Both the trial Court and the appellate Court have instead of considering the issues framed as to whether the plaintiff proves his case, have held that the appellant/defendant failed to be consistent with his case. The Apex Court in the case of Makhan Lal Bangal vs. Manas Bhunia and ors. (supra) has observed that the issues are required to be framed and recorded on material propositions of fact and law on which the parties are at variance. The evidence which is to be adduced before the trial Court must be confined to issues and the pleadings and no evidence on controversies is not covered by issues and pleadings shall normally be admitted. The Supreme Court has observed that an object of an issue is to tie down the evidence and arguments and design to a particular question so that there may not be doubt on what the dispute is. The judgment then proceeding issue-wise would be able to tell precisely how the dispute was decided. In the present case, the trial court has decided several issues together. Although, this is not impermissible, the trial Court, as a result, was more concerned about the defendant having failed to prove his case rather than the plaintiff having established his case by cogent evidence.

12. The submission of Mr. Lawande that assuming the respondent had no title to the property, an injunction could still follow as the plaintiff was in possession of the disputed property, cannot be accepted. It is no doubt true that the plaintiff can, on the strength of his possession, resist interference from the person who has no better title than himself to the suit property as held in the case of M. Kallappa Setty vs. M.V. Lakshminarayana Rao, AIR 1972 SC 2299. However, the findings of fact regarding possession are arrived at by the trial Court and the appellate Court without proper identification of the disputed property. The description of the suit property contained in the plaint does not match the sketch nor the boundaries as depicted by the witnesses examined on behalf of the plaintiff. Therefore, the Decree must be set aside. The Second Appeal is allowed, with no order as to costs.

NISHITA MHATRE, J.

Ssm.